Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

ROBERT MATICAN,

Petitioner,

v.

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ and CHRIS ZIMMERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. HASKEL
LAW OFFICES OF
MICHAEL A. HASKEL
167 Willis Avenue
Mineola, NY 11501
(516) 294-0250

Counsel for Petitioner

218373

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, in a situation in which a state executive official has time to deliberate but is faced with the pull of competing obligations, that official may be liable under 42 U.S.C. § 1983 for a violation of substantive due process only if an individual proves the official acted with intent to harm the individual, when the individual has sustained physical injury by virtue of a danger created by the official.

2. When a state executive official is faced with an obligation that runs contrary to protecting an individual's substantive due process liberty interest, under what circumstances is the state's competing obligation of such great importance that the official may be liable under 42 U.S.C. § 1983 for infringing upon that liberty interest only if the individual proves the official acted with intent to harm the individual?

3. Whether a confidential informant who, in providing the police with information leading to the arrest of his drug dealer, has been exposed to danger, and has been given a false sense of security by the police, is in a "special relationship" with the police that may give rise to liability on the part of the police for violation of the informant's substantive due process rights in the event of an injury to the informant.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner here and appellant below is Robert Matican ("Matican").

The respondents here and appellees below are the City of New York ("City"), John Schneider ("Schneider"), Julio C. Ordonez ("Ordonez"), and Chris Zimmerman ("Zimmerman").

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Matican v. City of New York*, 524 F.3d 151 (2d Cir. 2008), and is reprinted in the Appendix to the Petition ("App.") at 1a. The District Court's opinion is reported at *Matican v. City of New York*, 424 F. Supp. 2d 497 (E.D.N.Y. 2006), and is reprinted at App. 18a. The Court of Appeals' denial of Matican's motion for rehearing and rehearing *en banc* is unreported, and is reprinted at App. 42a.

JURISDICTION

The Court of Appeals entered its judgment on April 23, 2008. The Court of Appeals denied Matican's timely motion for rehearing and rehearing *en banc* on June 26, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."

2. The Civil Rights Act of 1871, 42 U.S.C. § 1983 ("§ 1983"), provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

I. Factual Background

Matican was arrested for possession of a controlled substance, and while in police custody, police officers, Schneider and Zimmerman, conceived of a plan (hereafter, the "Sting"), pursuant to which they would arrest Matican's drug dealer ("Dealer"), whose real name Matican did not know. Matican was to participate as a confidential informant ("CI"), by contacting Dealer to arrange a drug purchase at a location previously used for such purchases. When Dealer arrived at the Sting site, the police would stop him for making the illegal U-turn he customarily executed at that location, then use the traffic stop as a basis for searching him for drugs. The police assured Matican that they would "look after" him were Dealer to be released on bail and seek vengeance against him, and that in any event if Dealer possessed at the time of his arrest as much drugs as Matican anticipated, Dealer would not make bail. These assurances lulled Matican into a false sense of security, leading him to agree to participate in the Sting.

The Sting was executed the day of its conception. Instead of Matican meeting Dealer at the designated site, at least five police officers, both in plainclothes and in uniform, from at least three cars, both marked and unmarked, confronted Dealer,[1] who was found to be in possession of crack cocaine and marijuana. Upon being brought to the police station, Dealer's real name was

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1. Ordonez was a police captain and the precinct's presiding officer, and participated in the Sting.

revealed to be Steven Delvalle ("Delvalle"), a check of his arrest record revealing arrests for numerous violent offenses, including gun possession and assault with a box cutter. Further inquiry by the police would have revealed that Delvalle had prior convictions for, *inter alia*, assault in the second degree (using a box cutter) and possession of a loaded firearm. Notwithstanding the police assurance to Matican that Dealer would remain incarcerated, Delvalle was released on bail on September 28, 2001. Matican, who was not informed of Delvalle's real name, violent history, or release, deposed that he would have left the state had these facts been made known to him.

On December 8, 2001, Delvalle assaulted Matican, slashing him twice across the face with a box cutter and stating, "You ratted me. . . . Why did you rat me?" Matican's injuries required 272 stitches and resulted in nerve and muscle damage and severe scarring. Delvalle was subsequently arrested, pled guilty to attempted assault in the first degree, and was sentenced to prison.

II. Procedural History

Matican, severely injured as a consequence of defendants' conduct, brought a § 1983 suit alleging, *inter alia*, that Schneider, Zimmerman, and Ordonez violated his Fourteenth Amendment substantive due process right to be free from bodily injury caused by arbitrary state conduct, in planning and pursuing the Sting in such a way as to make Matican's involvement apparent to Dealer, leading to Matican's injury. In addition, Matican alleges that the Defendants violated his substantive due process rights by securing his

cooperation in the Sting through false promises of security, and by failing to warn him after the arrest of Dealer's violent history and release on bail. Although his injuries were inflicted by Delvalle, a private actor, Matican contends that the defendants are liable under both exceptions to the general rule of no governmental liability for private violence: state actors creating or increasing the danger of the violence ("state-created danger"), *cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201 (1989) (implying state actors may have liability unless they "played no part in . . . creation [of dangers faced by victim of private violence], nor did . . . anything to render [the victim] any more vulnerable to them"),[2] and state actors' failure to protect a person in a special relationship with the state ("special relationship"), *id.* at 199-200 ("when the State take a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"). (Collectively, state-created danger and special relationship shall be referred to as the "*DeShaney* exceptions.") Matican's § 1983 claim against the City alleges deliberate indifference towards Matican's constitutional rights in failing to train police officers adequately in the protection of CIs. In addition, Matican asserted pendent claims of negligence under New York law against the Defendants. Federal jurisdiction over the § 1983 claims was predicated upon

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2. Although this statement in *DeShaney* was *dicta*, most federal circuit courts, including the Second Circuit, have recognized a state-created danger exception to the general rule of nonliability for privately inflicted violence. *See, e.g., Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006) (collecting cases).

28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3); federal jurisdiction over the pendent claims was based upon 28 U.S.C. § 1367.

Defendants moved for summary judgment on all of the § 1983 claims.[3] The District Court (per Frederic Block, J.) granted their motion in its entirety, and dismissed the pendent claims without prejudice. App. 18a. Matican appealed to the Second Circuit, which affirmed the District Court's decision (the "Second Circuit Decision"). The Second Circuit Decision found that the individual Defendants' conduct in planning and executing the Sting was sufficiently affirmative to qualify as a state-created danger that could give rise to governmental liability for privately inflicted violence, App. 13a, but noted the absence of a relationship between the police and Delvalle apart from the Sting itself, App. 13a n.7. Avoiding a resolution of the issue of whether this factor precludes a finding of a state-created danger, App. 13a n.7, the Second Circuit Decision affirmed the District Court on the ground that the police's conduct did not shock the conscience, App. 16a-17a.

The Second Circuit Decision implicitly interprets an earlier Second Circuit decision, *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007), as holding that whenever

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3. Matican cross-moved for partial summary judgment on his pendent claims, but the District Court declined to exercise jurisdiction over those claims in light of its decision on the § 1983 claims, and the pendent claims are not the subject of this appeal. However, in the event this Court grants *certiorari* in this case, Matican will seek to have his pendent claims reinstated in the event one or more of his § 1983 claims is reinstated.

governmental officials must consider any "serious competing obligations," their actions cannot shock the conscience absent intent to harm. *See* App. 15a-16a. The Second Circuit Decision expressly rejects a balancing test proposed by Matican, who argued for adopting the test enunciated in *Youngberg v. Romeo*, 457 U.S. 307 (1982), whereby "the liberty of the individual" is balanced against "the demands of an organized society," *id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).[4] *See* App. 15a. Instead, the court explains that *Lombardi* provides the standard, App. 15a-16a, describing the police's safety in carrying out the Sting as a "serious competing obligation" that militates against finding a substantive due process violation, App. 16a. In essence, the Second Circuit Decision adopts the *Lombardi* standard that under such circumstance, a substantive due process violation could exist only if the police had intended him harm. *See* App. 15a-17a.[5]

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4. Specifically, Matican asked that the following factors be considered in the balancing:

> (1) The degree of danger to plaintiff caused by defendant's actions or omissions;
>
> (2) The degree of danger to the general public in guarding against the risk to the plaintiff;
>
> (3) The burden imposed upon the defendant in guarding against the risk to plaintiff; and
>
> (4) Special circumstances, such as Schneider and Zimmerman's false assurances of Matican's safety.

5. Matican did not allege that the individual Defendants acted with intent to harm him. *See* App. 33a.

Matican timely moved for a rehearing before the Second Circuit panel and a rehearing *en banc*, which motions were denied. App. 42a. This timely Petition for Certiorari followed.

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeals Are Divided Over Whether Intent To Harm Is A Necessary Element Of A Substantive Due Process Claim Against State Executive Actors Who Face The Pull Of Competing Obligations In Non-Emergency Circumstances.

The Second Circuit Decision effectively holds that even absent exigent circumstances, unless state executive actors intend to harm, their conduct is not conscience-shocking if they are confronted with competing obligations and choose to protect themselves instead of private individuals whom they have placed in danger. The court justifies its approach with the explanation that because defendant officers were "obliged to protect their own safety as well as Matican's, their design of the Sting does not shock the conscience," App. 17a, reasoning which appears at odds with that of the Supreme Court, and is certainly contrary to the approach taken by other circuits.

The shock-the-conscience test was articulated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), which instructs that "in a due process challenge to executive action," liability requires that the state actor's conduct "shock the contemporary conscience," *id.* at 847 n.8. Whether conduct is conscience-shocking depends upon the degree of culpability of the defendant and

surrounding circumstances. While harm resulting from ordinary negligence is never sufficient to sustain such a due process claim, *id.* at 849, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level," *id.* Particular circumstances determine if conduct is conscience-shocking provided the level of culpability lies between ordinary negligence and intent, for example, deliberate indifference. This Court has never defined deliberate indifference in a substantive due process setting, although *Farmer v. Brennan*, 511 U.S. 825 (1994), defined it as criminal law, or subjective, recklessness, *i.e.*, knowledge and disregard of an excessive risk to safety, in the Eighth Amendment context, *id.* at 837, 839-40. Circuit courts have differed as to whether the same definition applies in the substantive due process context . *See Sanford v. Stiles*, 456 F.3d 298, 310 n.13 (3d Cir. 2006) (noting circuit split as to whether subjective or objective deliberate indifference standard applies in substantive due process cases).

In the emergency situation presented in *Lewis*, where injury resulted fr m a police officer's car colliding with a passenger on a motorcycle being pursued in a high-speed chase, the Court rejected the Ninth Circuit's imposition of a deliberate indifference standard for liability, *see id.* at 854. Recognizing liability in emergency circumstances only when the police act with "intent to harm suspects physically or to worsen their legal plight," *id.*, the Court analogized a high-speed chase situation to the prison riot that confronted the defendants in *Whitley v. Albers*, 475 U.S. 312 (1986), an Eighth Amendment case. *See Lewis*, 523 U.S. at 853 ("The

analogy [of analysis of conduct during a prison riot under the Eighth Amendment] to sudden police chases (under the Due Process Clause) would be hard to avoid"). *Lewis* contrasted these situations, where liability requires intent to harm, with the failure to address the serious medical needs of pretrial detainees, *id.* at 850-53, where substantive due process liability attaches upon a finding of deliberate indifference, *id.* at 850.

As justification for imposing an intent-to-harm standard, *Lewis* emphasized that state actors often need to make instant choices, *id.* at 853 ("police officers are often forced to make split second judgments – in circumstances that are tense, uncertain and rapidly evolving") (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)) (internal quotation marks omitted). In addition, *Lewis* noted that state actors may be forced to choose between competing obligations. *Id.* (an "officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders").

Lewis did not directly address whether both of these factors are prerequisites for imposing the intent-to-harm standard, as opposed to one or the other alone being sufficient, and did not provide whether, if there is no emergency, the intent-to-harm standard applies if the obligation that causes the government actor to engage in a course of conduct running contrary to an individual's liberty interest is less important than that liberty interest or invites a different course of action.

However, *Lewis* observed that in many custodial cases, state actors who had "the luxury" of "time to make unhurried judgments" could make decisions that were "*largely* uncomplicated by the pull of competing considerations" *Id.* (emphasis added). In so reasoning, *Lewis* hints that the "pull of competing obligations" is less of a factor when there is time to reflect. Where the "pressure" and "tens[ion]" that accompany the need to make an immediate decision in "rapidly evolving" circumstances are absent, the pull is "largely" rendered manageable, or eliminated altogether. Certainly, there is no competition between obligations where there is time to consider alternatives and to avoid any conscious disregard of the risks to private individuals.

Lewis's distinction between split-second and unhurried decisions has been decisive in most Circuits other than the Second. In holding that the presence of competing obligations is alone sufficient for the intent-to-harm standard to apply, the Second Circuit Decision diverges from caselaw of the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. That decision also varies from the Third Circuit, which has held that the existence of competing obligations requires a higher *mens rea* standard than that which would otherwise apply, but has reserved decision on whether that higher standard is one of deliberate indifference or intent to harm.

A. A Standard of Culpability Lower Than Intent Should Apply When the State Actor Has Time to Deliberate, Regardless of Whether Competing Obligations Exist: Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.

The Sixth, Seventh, Eighth, and Tenth Circuits have found that the inverse of *Lewis* applies, *i.e.*, when there are no exigent circumstances, the standard for liability *must be* deliberate indifference or recklessness rather than intent-to-harm. *See Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) (stating, "In situations wherein the implicated state, county, or municipal agent(s) are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action . . . , their actions will be deemed conscience-shocking if they were taken with 'deliberate indifference' towards the plaintiff's federally protected rights"); *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007) (stating, "when the circumstances permit public officials the opportunity for reasoned deliberation in their decisions, we shall find the official's conduct conscience shocking when it evinces a deliberate indifference to the rights of the individual"); *Wilson v. Lawrence County*, 260 F.3d 946, 956 (8th Cir. 2001) (holding that "in situations where state actors have the opportunity to deliberate various alternatives prior to selecting a course of conduct, such action violates due process if it is done recklessly")[6]; *Neal v. St. Louis County Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000) ("In situations where a state actor is afforded

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6. However, *Wilson* also considers whether there is a countervailing interest. *See id.* at 957.

a reasonable opportunity to deliberate various alternatives prior to electing a course of action, the chosen action will be deemed 'conscience shocking' if the action was taken with 'deliberate indifference'") (citing *Lewis*, 523 U.S. at 850-51);[7] *Perez v. United Gov't of Wyandotte County/Kansas City*, 432 F.3d 1163, 1166 (10th Cir. 2005) ("when a government official has enough time to engage in 'actual deliberation,' conduct that shows 'deliberate indifference' to a person's life or security will shock the conscience and thereby violate the Fourteenth Amendment"), *cert. denied*, 548 U.S. 905 (2006).

The Sixth Circuit, in *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002), applied a deliberate indifference standard in a situation in which the court expressly acknowledged that the defendant police officers "undoubtedly faced competing obligations" in

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7. In *Putnam v. Keller*, 332 F.3d 541 (8th Cir. 2003), the Eighth Circuit also found that a showing of deliberate indifference was sufficient to allege a substantive due process violation where the state actors had a reasonable opportunity to consider alternatives before acting, *id.* at 548. The court subsequently mentioned that it recognized that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." *Id.* (quoting *Lewis*, 523 U.S. at 850) (alteration in original) (internal quotation marks omitted). Given that *Putnam* found deliberate indifference based upon the defendants' opportunity to consider alternatives, the latter observation is, at best for defendants, *dicta*; it is not clear what purpose was served by the inclusion of that observation in the opinion. Consequently, *Wilson* and *Neal* are still good law in the Eighth Circuit. *Putnam* ultimately granted summary judgment to the defendants on the substantive due process claim on qualified immunity grounds. *Id.*

choosing how to act in a situation not requiring split-second decisions, *id.* at 511.[8] While none of the cases in the other circuits — *King*, *Wilson*, *Neal*, or *Perez* — expressly addresses the question of competing obligations, there is no suggestion in any of them that the deliberate indifference standard each applies would not also obtain in situations where competing obligations were present. Thus, the Sixth, Seventh, Eighth, and Tenth Circuits disagree with the Second Circuit's imposition of an intent to harm standard whenever competing obligations are present.

While the Ninth Circuit has not gone as far in announcing an express *per se* rule that culpability standard below that of intent to harm applies when the state actor has time to deliberate, it has implied as much by describing the time-to-deliberate factor as the "critical question" in setting the culpability standard. The same year *Lewis* was decided, the Ninth Circuit characterized *Lewis* as "describ[ing] the critical consideration [in determining the culpability standard for finding what executive actions "shock the conscience"] as whether the circumstances are such that 'actual deliberation is practical.'" *Moreland v. Las Vegas*

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8. In its decision earlier this month in *Hunt v. Sycamore Community School District Board of Education*, No. 07-4082, ___ F.3d ___, 2008 WL 4163222 (6th Cir. Sept. 11, 2008), the Sixth Circuit found that the existence of a "countervailing legitimate purpose" affects the determination of whether a state actor's conduct shocks the conscience. *Id.* at *9. However, it appears that such a factor is considered not in terms of whether the *mens rea* standard is one of intent to harm or deliberate indifference, but, rather, whether deliberate indifference, being the governing standard, may be found to exist. *See id.*

Metro. Police Dep't, 159 F.3d 365, 372 (9th Cir. 1998) (quoting *Lewis*, 523 U.S. at 851). *Moreland* also observed that that "each of the circuits that has interpreted and applied this aspect of the *Lewis* decision has recognized that *the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct.*" *Id.* at 373 (emphasis added). *Moreland* ultimately held that the intent standard applied where "it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others." *Id.* at 372; *see id.* at 373. While not expressly holding that a deliberate indifference standard would apply whenever the state actor had time to consider alternative actions, *Moreland* effectively held as such by implication. If the presence or absence of time to deliberate represented the "critical question," *id.* at 373, in setting the culpability requirement, and if, under *Lewis*, intent to harm was the required mental state when the state actor lacked time to deliberate, then deliberate indifference must be the standard when the state actor had time to deliberate; otherwise, the presence of time to deliberate would not be the "critical question." Like the Sixth, Seventh, Eighth, and Tenth Circuit cases discussed above, *Moreland* does not suggest that the presence of competing obligations would require an intent-to-harm standard when there is time to deliberate.

The Fifth Circuit also appears to have held by implication that a state actor who has time to deliberate is subject to a deliberate indifference, and not an intent

to harm, standard. In *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999), *cert. denied*, 530 U.S. 1274 (2000), the Fifth Circuit held that as a result of FBI agents conducting a sting operation having "made decisions which harmed the Plaintiffs after ample opportunity for cool reflection," "the due process clause protects the Plaintiffs from any harm that arose from the officers' deliberate indifference," *id.* at 592. However, the court also observed that the officers had "invested almost two years and thousands of man hours in developing the sting operation," *id.*, which extended period, well beyond an ephemeral opportunity to reflect, may have affected the court's outcome. As with the Sixth, Seventh, Eighth, Ninth, and Tenth Circuit cases discussed above, *Brown* does not suggest that the existence of competing obligations would warrant imposition of an intent-to-harm standard when the state actor has time to deliberate.

B. The Presence of Competing Obligations Increases the Culpability Required for Finding a Violation, But Not Necessarily to the Intent Level: Third Circuit.

The Third Circuit has found, "more culpability is required to shock the conscience . . . to the extent the responsibilities of the state actors require a judgment between competing, legitimate interests." *Schieber v. City of Philadelphia*, 320 F.3d 409, 419 (3d Cir. 2003). Insofar as *Schieber* found that the record before it in that particular case did not support a finding of deliberate indifference, the Third Circuit dismissed the action without determining whether a standard higher than that of deliberate indifference might apply. *Id.* at 421.

C. When a State-Created Danger Exists, and the State Actor Has Time to Deliberate, Deliberate Indifference Is the Standard of Culpability: D.C. Circuit.

The D.C. Circuit utilizes the deliberate indifference standard in substantive due process cases in "circumstances where the State has a heightened obligation toward the individual." *Fraternal Order of Police Dep't of Corrections Labor Comm. v. Williams*, 375 F.3d 1141, 1145-46 (D.C. Cir. 2004) (quoting *Butera v. Dist. of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001)) (internal quotation marks omitted). Such special circumstances include the *DeShaney* exceptions. *See id.* (special relationship); *Butera*, 235 F.3d at 652 (state-created danger, in situations when "actual deliberation is practical") (quoting *Lewis*, 523 U.S. at 851) (internal quotation marks omitted).[9]

Because the Second Circuit Decision involved both of the aforementioned special circumstances, if D.C. Circuit precedent were applied therein, the required *mens rea* would be deliberate indifference. Therefore, like the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and possibly Third, Circuits, the D.C. Circuit would not have required a showing of intent to harm in the case at bar.[10]

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9. *Williams* did not specifically hold whether, in an involuntary custody case, deliberation needed to be practical for the deliberate indifference standard to apply.

10. However, D.C. Circuit caselaw differs from that of those other circuits in that it uses a deliberate indifference standard only in cases in which there is a "heightened obligation toward the individual." Thus, in a case in which the state actor has time to deliberate but does not have a heightened obligation toward the victim, the actor is held to an intent-to-harm standard.

D. Intent to Harm Is the Required *Mens Rea* Whenever "Serious Competing Obligations" Are Present, Regardless of Whether the State Actor Has Time to Deliberate: Second Circuit.

The Second Circuit Decision, which expressly acknowledges that "the officers had ample opportunity to plan the sting in advance," App. 15a, nonetheless relies upon recent Second Circuit precedent that had suggested intent to harm might be required even in the presence of time to deliberate. *See* App. 15a (stating that in *Lombardi*, 485 F.3d at 85, the court had "held that, regardless of whether the situation was a time-sensitive emergency, plaintiffs' allegations of deliberate indifference did not shock the conscience").[11] Thus, the

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11. This reliance upon *Lombardi* is at best problematic. As the Second Circuit Decision noted, *Lombardi* did state that whether "[h]urried or unhurried, the defendants were subjected to the 'pull of competing obligations,'" *Lombardi*, 485 F.3d at 83 (quoting *Lewis*, 523 U.S. at 854), *quoted in* App. 15a. However, *Lombardi* was influenced by the fact that

> the [defendants'] decisions cannot [on the basis of their not being in the context of the rush of a car chase] be fairly characterized as 'unhurried' or leisured. The [report of the EPA's Office of the Inspector General] (relied upon by the complaint) shows that the defendants were required to make decisions using rapidly changing information about the ramifications of unprecedented events in coordination with multiple federal agencies and local agencies and governments.

Lombardi, 485 F.3d at 82. Only after the observation that the defendants' decisions were not "unhurried" did *Lombardi* then

(Cont'd)

Second Circuit stands in conflict with the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits, and possibly the Third, meriting this Court's review to resolve this Circuit split.

E. The Second Circuit's Standard Conflicts with *Lewis*'s Reasoning, if Not Its Holding.

Matican submits that the Second Circuit Decision holds substantive due process plaintiffs to a higher standard of proof than that contemplated by *Lewis*. By treating the existence of competing obligations as a sufficient basis to impose the intent standard, the Second Circuit disregards *Lewis*'s extended discussion of how prison officials have greater time to make decisions concerning the medical treatment of inmates than they do when deciding how to cope with a riot, or than police officers have in deciding whether to engage in a high-speed chase. The existence of competing obligations is not a factor to be viewed separately from the time-to-deliberate circumstance; rather, it is what creates the need for the deliberation in the first place. *See Lewis*, 523 U.S. at 851 ("As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical").

(Cont'd)

add its "[h]urried or unhurried" language. *See id.* at 83. Thus, the "[h]urried or unhurried" language, being in reference to a factual situation *Lombardi* itself found was not present, was *dicta*. However, as *certiorari* is often granted to resolve intercircuit, but not intracircuit, disputes, Matican focuses instead on the conflict between the Second Circuit Decision and other circuits' decisions.

At the very least, the "luxury" of time to deliberate is a factor that should be considered by the courts when evaluating a state actor's ability to address the pull of competing obligations without being deliberately indifferent to the interests of a private individual whom the actor has placed in danger. Though this Court's decision in *Youngberg* compels such judicial consideration, the Second Circuit did not factor into the mix the unhurried nature of the police's decision-making. This was error.

II. In Various Respects, There Are Differences Among The Supreme Court And The Second, Sixth, And Eighth Circuits As To Whether, And When, A Competing Obligation Requires Imposition Of An Intent To Harm Standard.

Lewis does not expressly set forth how, in substantive due process cases, a "competing obligation" is to be evaluated or when it is sufficiently important to merit imposition of an intent-to-harm standard. However, an intent to harm standard should not be imposed if: (1) the state's competing obligation arises from the state actor's own conduct, including situations when the state actor could have avoided risk to the individual's liberty interest in the first place by taking alternative action; or (2) the state's competing obligation is less important than its obligation to the private individual it has endangered, as when the likelihood of danger to the state actor is less than that to the private individual. In both of these respects, the Second Circuit Decision conflicts with decisions of this Court and/or of other circuits.

A. When the State's Competing Obligation Arises from the State Actor's Own Conduct: The Second Circuit Decision Conflicts with *Lewis*'s Reasoning.

In support of its holding as to *mens rea* in high-speed chases, *Lewis* notes that the petitioner police officer had not created the dangerous situation in the first place; instead, he

> was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause [the driver of the pursued vehicle's] high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes.

Id. at 855. Such language indicates a mental culpability requirement lower than that of intent to harm may apply when the state actor creates the underlying dangerous situation.

The instant case certainly involves police creation of the underlying circumstances that led to Matican's injury, by the police officers who conceived and conducted the Sting. Unlike the high-speed chase that confronted the police in *Lewis*, in the instant case the stage was set by the police themselves; yet the Second Circuit imposed an intent-to-harm standard

nonetheless. The Second Circuit Decision therefore arguably conflicts with *Lewis*.[12]

Moreover, the officers could have achieved their aims through use of alternative means that would not have given rise to a conflict between Matican's liberty interest and the competing obligation of their own safety. This was not a Catch-22 situation such that the officers would have violated someone's rights no matter what. *Compare Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, No. 07-4082, ___ F.3d ___, 2008 WL 4163222, at *10 (6th Cir. Sept. 11, 2008) (discussing judicial refusal to impose substantive due process liability for failure to perform an act that itself might have exposed the governmental actor to liability on another theory). Insofar the officers had to choose between their safety and Matican's, those competing obligations arose only because of the individual Defendants' failure to consider alternatives to the Sting. As concerned individual Defendants, the Second Circuit Decision weighed the threat of exposing Matican's identity through the use of excessive police presence in the Sting against the threat of physical harm to police officers in their conduct of the Sting. *See* App. 16a. The court thus apparently considered whether "great harm" could occur to Matican or to the officers under the assumption that the underlying circumstances of the Sting, *e.g.*, the date, time, place, and Matican's communications with Dealer in setting it up, would have

12. As discussed *infra*, the fact that the officers' own conduct led to the competing obligation also factors into whether the competing obligation outweighed Matican's liberty interest, which issue *Lewis* appeared to treat separately from that of whether the officers were responsible for the existence of the competing obligation.

been the same regardless of the individual Defendants' actions, and that the only variable was how much manpower the police would utilize in its execution of the Sting. This reasoning ignores the fact that *the officers themselves decided* whether, when, and where to carry out the Sting in the first place.[13] In viewing the issue so narrowly, the Second Circuit completely disregarded Matican's argument that the police, while using Matican's assistance to obtain information about Dealer (*e.g.*, his license plate number and other identifying information), could have planned the Sting so that it occurred at a time and place with which Dealer would not have associated Matican. Had the police done so, any risk to Matican would have been minimized, if not entirely eliminated. There would have been no trade-off, such as it was, between Matican's safety and that of the officers. While the officers could still consider the amount of force required to apprehend Dealer without jeopardizing their own safety, Matican's safety would have been protected regardless.

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13. Although the officers in *Lewis* also decided whether to engage in the pursuit, it is not clear that those officers would have been able to apprehend the motorcyclist at a later time, had they not pursued him immediately. Thus, the instant case differs from *Lewis* in that there was not necessarily a trade-off between deterring wrongdoing and avoiding danger to innocent civilians.

B. When the State's Competing Obligation Is Less Important Than Its Obligation to the Private Individual It Has Endangered: The Second Circuit Decision Conflicts with *Youngberg*'s Holding and Language in *Lewis*, and with Sixth and Eighth Circuit Precedent.

Supreme Court and Eighth Circuit caselaw suggest that the presence of a competing obligation justifies imposition of an intent-to-harm standard, if at all, only when the competing obligation is of importance at least equal to that of the liberty interest infringed by the state actor. The Sixth Circuit has declined to impose an intent-to-harm standard even when there is a competing obligation, instead applying a deliberate indifference standard within which context it considers the competing obligation as one of the factors in determining if the standard is satisfied. By contrast, the Second Circuit Decision imposes the intent-to-harm standard even if the competing obligation is less important than the liberty interest, provided the competing obligation is "serious." Given the circumstances in the instant case, Matican's liberty interest outweighed the competing obligation of police protection, and the result would have been different under the conflicting precedent.

In discussing why a higher threshold level of culpability should apply to actions taken in a high-speed chase than in providing medical care to detainees, *Lewis* noted that the State's responsibility for providing medical care to detainees "does not ordinarily clash with other *equally important* governmental responsibilities." *Id.* at 852 (quoting *Whitley v. Albers*, 457 U.S. 312, 230

(1986)) (internal quotation marks omitted) (emphasis added). This balancing of one interest against another is consistent with the balancing of "the liberty of the individual" against "the demands of an organized society," in determining whether a substantive due process right has been violated, as provided in *Youngberg*, 457 U.S. at 320 (quoting *Poe*, 367 U.S. at 542) (Harlan, J., dissenting)).[14] Varying the level of culpability necessary to find a substantive due process violation, directly with the ratio of the importance of the victim's liberty interest to the governmental actor's competing obligation, is a means of incorporating *Youngberg*'s balancing concept into *Lewis*'s shock-the-conscience test.

In an Eighth Circuit case, *Wilson v. Lawrence County*, 260 F.3d 946, the plaintiff alleged that after coercing him into confessing to commission of a murder,

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14. To be sure, *Youngberg* was a special relationship case, *see DeShaney*, 489 U.S. at 198-200, but once it has been shown that one of the *DeShaney* exceptions to state actors' immunity from liability for privately inflicted violence, inquiry is triggered as to whether a state actor has committed a constitutional tort. The reason this inquiry is triggered should not, in isolation from other factors, set the *mens rea* standard, instead becoming one of many considerations in determining culpability. Subject to this requirement in constitutional tort cases involving injury caused by a third person that there be a custodial relationship or a state-created danger, the *Youngberg* test remains good law. *See Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008) (applying *Youngberg* test); *Patten v. Nichols*, 274 F.3d 829, 842 n.5 (4th Cir. 2001) (stating *Youngberg* is still good law); *but see Hare v. City of Corinth*, 74 F.3d 633, 646-47 (5th Cir. 1996) (en banc) (questioning continued vitality of *Youngberg* in light of *DeShaney*).

police officers violated his substantive due process rights by failing to investigate leads that pointed to other suspects. *Id.* at 950. The court found that the defendants had adequate time to deliberate. *Id.* at 957. *Wilson* found that because "[t]here is no countervailing *equally important governmental interest* that would excuse the appellants from fulfilling their responsibility to investigate" such other leads given an involuntary confession and the absence of any reliable corroborating evidence, the standard for liability was one of recklessness. *Id.* (emphasis supplied).

In a case decided after the Second Circuit Decision, the Sixth Circuit found that when a governmental actor has time to deliberate before acting, the *mens rea* standard is one of deliberate indifference rather than intent to harm, but the existence of a "countervailing, legitimate governmental purpose" served by the actor's choice renders it unlikely that deliberate indifference will be found to exist. *See Hunt*, 2008 WL 4163222, at *9. *Hunt* held that as a general rule, when the government's countervailing purpose was a mandatory duty imposed by federal law or the Constitution, the government's action would not shock the conscience; otherwise, the government actor would be placed in a position of unavoidable liability. *Id.* at *10-11.[15]

The Second Circuit Decision conflicts with *Youngberg*, *Lewis*, *Wilson*, and *Hunt*. At bar, the Second Circuit considered only that the individual Defendants had "two serious competing obligations: Matican's safety

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15. *Hunt* relied in part on *Lombardi* in reaching this result. *See id.* at *10.

and their own." App. 16a. The court observed that the individual Defendants

> could reasonably have concluded that the arrest of a potentially violent drug dealer demanded the use of overwhelming force, even if that show of force might jeopardize the informant's identity in the future. We are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands.

App. 16a. Thus, the Second Circuit did not weigh the importance of the obligations — protecting their own safety, and protecting informants' safety — against one another to see if the former at least equaled the latter in gravity, as *Youngberg*, *Lewis*, or *Wilson* would dictate; it merely found the officers' interest in their safety automatically prevailed by virtue of its being "serious." Also, *Lewis*'s reasoning that no "substantial countervailing interest excuse[s] the State from making provision for the decent care and protection of those it locks up," *Lewis*, 523 U.S. at 851, thus justifying a deliberate indifference standard in a case involving that issue, is inconsistent with the Second Circuit Decision, since prison officials could obviously conserve scarce resources by not providing medical treatment to inmates, and conservation of resources could be considered a "serious competing obligation."

Matican submits that had the Second Circuit balanced Matican's liberty interest against the individual defendant officers' obligation to protect themselves, the former would have prevailed, requiring analysis of Matican's substantive due process claims under a culpability standard lower than that of intent to harm. This is because there was a significantly greater probability that Dealer would (1) conclude from the manner in which the Sting was conducted that Matican had informed upon him, and (2) assault Matican in retaliation, than that a more low-key sting operation, involving one police car with one or two officers pulling Dealer over on a traffic stop, would result in injury to the officer or officers. The officers could have reduced the danger to themselves while potentially improving the objectives of law enforcement, as by learning Dealer's identity, engaging in surveillance, and arresting him when he was vulnerable, possibly ascertaining his suppliers in the process.[16]

In an attempt to distinguish the instant case from *Butera*, where an informant whom the defendant officers sent into an undercover drug purchase was beaten to death, the Second Circuit Decision refers to the circumstance that the *Butera* officers were "monitoring from the safety of their cars, and thus would have incurred no risk had they fitted the informant with wires or agreed in advance on danger signals." App. 16a (citing *Butera*, 235 F.3d at 642, 644) (citation omitted). However, even if the *Butera* informant had worn a wire, the

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16. The Sting should be considered a failure for many reasons, including the failure to identify or apprehend Dealer's superiors.

defendant officers would have had to leave their cars and confront his assailants to protect the informant, thereby incurring a risk of physical injury. By the Second Circuit's logic, the officers in *Butera* would not have been liable even if they had wired the informant, known he was being beaten to death, and taken no action, because actually protecting him would have placed them at risk. The Second Circuit's reasoning leads to such absurd results.

To be certain, the Second Circuit Decision expresses a reticence to second-guess police decision making, but this argument could be used to insulate from scrutiny virtually any action taken by government. In any event, Matican does not ask the Court to "dictate" how police should protect themselves; he only requests the right to present the trier of fact with evidence upon which the jurors can, provided they believe that evidence supports this result, impose liability based on their collective exercise of common sense in determining that police had equal or superior alternatives to the Sting, yet were deliberately indifferent to a private individual whom they affirmatively placed in danger.

III. The Confidential Informant Has A Special Relationship With Police.

The Second Circuit Decision also rejects the argument that a confidential informant had a special relationship with police. App. 9a-10a. Citing other circuits, and rejecting the reasoning of *G-69 v. Degnan*, 745 F. Supp. 254 (D.N.J. 1990), the Second Circuit reasons, in essence, that only when there is a custodial relationship is the claimant in a civil rights case rendered

so helpless that a state duty arises to protect a private individual from private violence. That is an oversimplification. No less than a prison inmate or a ward of the state, a confidential informant relies upon police to protect the informant's identity and safety.[17]

Matican was lulled into a false sense of security by police, and was, in relation to the limited issue of retaliation by Delvalle, rendered as helpless as an inmate because Matican lacked knowledge of the danger of private violence to him. Matican's helplessness was the product of police misrepresentations. He had relied upon their skills in planning and executing the Sting in a way that would secure his safety. The police officers undoubtedly knew that they would be imperiling Matican, while Matican, with no expertise in this matter, would have no such awareness. Matican's helplessness, brought about by his beliefs as cultivated by the police, is what is at issue here. As *G-69* recognizes, the inability to protect oneself is not exclusive to situations where the claimant is in custody.

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17. Although it is Matican's position that this issue is moot because there was a state-created danger here and the mental element of a deliberate indifference has been met, Matican points out that there are alternative grounds for granting this petition.

IV. The Second Circuit Decision Undermines Important Public Policies.

Police officers place themselves at risk whenever they protect a person from physical harm. By the Second Circuit Decision's reasoning, so long as the dangers to which police officers expose private individuals through their deliberate actions (but without intent to harm) are so serious that ameliorating them would place the police at risk of physical harm, the officers could never be liable for a substantive due process violation for failure to protect such individuals, because they could always cite their own self-protection as a competing obligation. To use the hypothetical situation contemplated in *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982), a police officer could throw someone into a snake pit (without intent to harm the person), then refuse to rescue the victim on the grounds that the officer could be bitten were he to lend assistance. The Second Circuit Decision effectively allows police officers to place private individuals in danger without intent to harm them, promise them protection, renege on that promise, then cite their own safety as a reason for such reneging. Such is not good public policy.

The motto of the New York City Police Department is *fidelis ad mortem*, or "Faithful till Death." The Second Circuit Decision provides a tragically ironic interpretation of this expression of purpose by making the police themselves, rather than the public, the object of the "Faith[]," and belies the implication in "till Death" of police prioritization of civilian lives above their own. Certainly it was not the intent of Congress, in enacting § 1983, to elevate government actors' interests ahead

of the liberty interests of private individuals such actors place in danger. Public cynicism about the functioning of government is fueled by court decisions that insulate government actors from liability for misconduct that render lofty government assurances of duty and service absurdities. Matican does not ask this Court to depart from the spirit or intent of § 1983, but rather requests that when adding judicial gloss, the Court, consistent with congressional purpose, interpret § 1983 in ways that do not undercut public confidence in government. He advocates that this Court strip away the plaque that the Second Circuit has placed upon constitutional tort cases that will, if followed, undercut public confidence in government by protecting those responsible for violating the constitution in an unconscionable way.

As a practical matter, a denial of review here would insulate police officers from scrutiny whenever they place their own safety above those of private individuals whom they have placed in danger. In and of itself, this decision is extremely damaging to government credibility, to say nothing of the constitutional implications that are discussed above. Where law enforcement agents, with all their expertise and resources, resort to false assurances and the execution of plans which injure private citizens, while keeping themselves safe, they have engaged in behavior sufficient to shock the conscience. *See Butera*, 235 F.3d at 643-44 (finding issue of fact as to whether officers' conduct shocked the conscience); *see also Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065 (9th Cir. 2006) (finding issue of fact as to whether officer's conduct constituted deliberate indifference); *Monfils v. Taylor*, 165 F.3d 511, 514, 516-17 (7th Cir. 1998) (upholding jury

finding that officer created a danger, without specifying required mental culpability).

The Second Circuit Decision is driven by the assumption that by imposing constitutional tort liability upon police officers, courts would be interfering in a negative way with such officers' decision making, even when those decisions are made with deliberate indifference in a non-emergency situation, and the pull of competing obligations is tainted by the officers' creation of the danger to begin with. However, the Second Circuit should have considered the positive effects that imposing liability would have on discouraging government abuse. There is no reason to suppose that government actors will act more responsibly because the judiciary confers immunity upon them under § 1983, despite their deliberate indifference; on the contrary, such immunity only discourages the worst in government. The primary concern of the courts should be the restraint of government misconduct, not the insulation from liability of government actors who disregard the rights of private individuals. Matican was lulled into a false sense of security by police officers' misrepresentation concerning his safety and he was exposed to a danger that the police have themselves created. This circumstance was then followed by police officers placing their safety above that of Matican.

Under these circumstances, courts should be concerned, not exclusively with the safety of police who engage in misconduct, but also with the integrity of government itself. As James Madison observed, "public opinion sets balance to every government, and is the

real sovereign in every free one." [18] The electorate must have confidence in government actors, and courts hardly advance government credibility when immunizing public officials from constitutional tort liability despite their deliberate indifference that places their interests above those of the public they are charged to protect.

This Court has recognized that strong public policy reasons underlie robust enforcement of § 1983 in civil cases brought against wayward law enforcement officers. In *Hudson v. Michican*, 547 U.S. 586 (2006), the Court observed, in holding that violation of a "knock-and-announce" rule applicable under the Fourteenth Amendment did not require suppression of evidence, that constitutional safeguards were available for unconstitutional conduct in the form of § 1983 claims. *Id.* at 596-98. Emasculating § 1983 would be contrary to this function of § 1983 as a deterrent to unconstitutional conduct.

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18. James Madison, *Public Opinion*, National Gazette, Dec. 19, 1791, *in* 14 Papers of Madison, 170 (Matican A. Rutland et al. Editions 1977).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL A. HASKEL
LAW OFFICES OF
MICHAEL A. HASKEL
167 Willis Avenue
Mineola, NY 11501
(516) 294-0250

Counsel for Petitioner